



**Kenya National Human Rights Commission & 2 others v Gachagua & 2 others;  
 Judicial Service Commission & 2 others (Interested Parties) (Petition E115 of 2024)  
 [2025] KEHC 5573 (KLR) (Constitutional and Human Rights) (10 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5573 (KLR)

**REPUBLIC OF KENYA  
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
 CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E115 OF 2024**

**AB MWAMUYE, J**

**APRIL 10, 2025**

**BETWEEN**

**KENYA NATIONAL HUMAN RIGHTS COMMISSION ..... 1<sup>ST</sup> PETITIONER  
 MUSLIMS FOR HUMAN RIGHTS ..... 2<sup>ND</sup> PETITIONER  
 KHELEF KHALIFA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**GEOFFREY RIGATHI GACHAGUA ..... 1<sup>ST</sup> RESPONDENT  
 ETHICS AND ANTI CORRUPTION COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
 ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... INTERESTED PARTY  
 KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... INTERESTED  
 PARTY  
 LAW SOCIETY OF KENYA ..... INTERESTED PARTY**



## JUDGMENT

### A. INTRODUCTION

1. The Petitioners herein filed a Petition dated 5<sup>th</sup> March, 2024 seeking the following remedies: -
  - i. A declaration that the public utterances and conduct of the 1<sup>st</sup> Respondent on the 14<sup>th</sup> January 2024 are a violation of Articles 159 and 160 of the constitution, violating the independence of the Judiciary.
  - ii. A declaration that the utterances and conduct of the 1<sup>st</sup> Respondent are a violation of Articles 73 and 131 (1) (a) & (e), 131 (2) (a) & (e) of the constitution.
  - iii. A declaration that the utterances and conduct of the 1<sup>st</sup> Respondent constitutes conduct that demeans, diminishes honour and indignities the office of the Deputy President.
  - iv. A declaration that the utterances and conduct of the 1<sup>st</sup> Respondent are a violation of Articles 75 of the constitution.
  - v. A declaration that the utterances by the 1<sup>st</sup> Respondent, being, unsubstantiated claims of corruption, constitute a threat to the personam of Lady Justice Esther Maina.
  - vi. An order that the 1<sup>st</sup> Respondent publishes -in two Newspapers with national circulation- a retraction and apologies on the injurious statements alleging corruption against Lady Justice Esther Maina, within 14 days of the Court's Judgment and files proof hereto with the court
  - vii. Costs of the suit."
2. The Petition was supported by the grounds on the face of the said Petition and the Supporting Affidavit of the Khelef Khalifa, the 3<sup>rd</sup> Petitioner.
3. The Respondents and Interested Parties filed their responses as follows:
  - a. The 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection dated the 20<sup>th</sup> March, 2024;
  - b. The 2<sup>nd</sup> Respondent filed its Grounds of Opposition dated the 14<sup>th</sup> October, 2024;
  - c. The 3<sup>rd</sup> Respondent filed a Notice of Preliminary Objection dated the 5<sup>th</sup> April, 2024; and
  - d. The 1<sup>st</sup> Interested party filed its undated Grounds in Support.

### B. The Petition

4. The Petitioners averred that on the 11<sup>th</sup> January 2024, the 1<sup>st</sup> Respondent while holding office as the Deputy President of the Republic of Kenya, publicly made some unfounded remarks against the Institution and performance of the Judiciary. The statements were in response to various ongoing cases pending before various courts and touching on Government policies that were claimed by the 1<sup>st</sup> Respondent to have been delayed.



5. The Petitioners stated that the said remarks included allegations and rumors on corruption and misconduct of Judicial Officers and members of the Judiciary while exercising their constitutional duties and/or obligations and a direct attack against a Judge who had executed and performed her constitutional duties in good faith.
6. Specifically, the Petitioners took issue with the 1<sup>st</sup> Respondent stating during one of his public addresses on 14<sup>th</sup> January, 2024 that High Court Judge Lady Justice Esther Maina was “corrupt”.
7. The Petitioners did contend that during the impugned address, the 1<sup>st</sup> Respondent admitted that his frustrations with the said Hon. Judge stemmed from criminal proceedings that she had presided over in which he was the accused person. The 1<sup>st</sup> Respondent is said to have vowed to file a petition before the Hon. Chief Justice on or before 18.01.2024 seeking that the said Hon. Judge be removed from office on grounds of corruption and misconduct. According to the Petitioners, the 1<sup>st</sup> Respondent made those assertions without any intention to petition the Judicial Service Commission under the provisions of Article 168 of the constitution but rather as a scheme to apply political pressure against the Judiciary and in order to undermine the standing of the Hon. Judge and the entire Judiciary as an independent arm of Government.
8. The Petitioners did further contend that the alleged utterances of the 1<sup>st</sup> Respondent undermine the independence of the Judiciary and amount to conduct unbecoming of a State Officer in total contravention of Chapter Six of the constitution and particularly Article 73 (a) (i).
9. Consequently, the Petitioners prayed for this Honourable Court to issue the declaratory orders sought and further order the 1<sup>st</sup> Respondent to publish a retraction and apologies on the injurious statements alleging corruption against Lady Justice Esther Maina.

### C. The Responses

10. The 1<sup>st</sup> Respondent opposed the Petition through a Notice of Preliminary Objection dated 20<sup>th</sup> March, 2024 as well as a Replying Affidavit deponed on 30<sup>th</sup> June, 2024. The 1<sup>st</sup> Respondent’s position was that the Petition fails to identify with sufficient particularity the Articles of the constitution which have been allegedly violated or are threatened with violation by the utterances of the 1<sup>st</sup> Respondent. Further, the 1<sup>st</sup> Respondent argued that the Petitioners’ grievances about the specific utterances of the 1<sup>st</sup> Respondent in issue are entirely anchored on the Petitioners’ opinion and perception as to the ‘propriety and appropriateness’ of the said utterances rather than any cogent violation or threatened violation of the constitution.
11. The 1<sup>st</sup> Respondent further stated that the said utterances were made in exercise of his freedoms of belief, opinion, and expression under Article 32(1) and Article 33(1) of the constitution. It was the 1<sup>st</sup> Respondent’s position that in exercise of those rights through the specific utterances complained of, he did not and could not have committed a violation or a threatened violation of the constitution as alleged by the Petitioners.
12. The 2<sup>nd</sup> Respondent vide its Grounds of Opposition dated the 14<sup>th</sup> October, 2024 stated that it was not a party in High Court Anti- Corruption and Economic Crimes Case No: E020 OF 2020: Asset Recovery Agency Vs. Rigathi Gachagua & Another. The 2<sup>nd</sup> Respondent proceeded to argue that if the 1<sup>st</sup> Respondent was dissatisfied with the conduct of Hon. Judge in the said matter, then the 1<sup>st</sup> Respondent should have opted to petition the Judicial Service Commission.



13. The 2<sup>nd</sup> Respondent further added that all State and Public Officers are bound by the values and principles enshrined under Article 10 and Chapter 6 of the constitution in their conduct of public affairs.
14. The 3<sup>rd</sup> Respondent also filed a Notice of Preliminary Objection dated the 5<sup>th</sup> April, 2024 and stated that the Constitutional Petition herein discloses no justiciable cause framed as a constitutional question or issue before the constitutional division of the High Court since the matter discloses a cause of action that ought to be filed and determined as an ordinary civil suit in the form of defamation proceedings.
15. The 3<sup>rd</sup> Respondent further argued that the High Court has no jurisdiction to grant the orders sought in the Constitutional Petition since the primary constitutional body mandated to enforce the Leadership and Integrity Act is the Ethics and Anti-Corruption Commission, the 2<sup>nd</sup> Respondent.
16. The 1<sup>st</sup> Interested Party filed its Grounds in Support of the Petition which were undated. It stated that judicial independence is paramount since it safeguards the rule of law, ensures fair and impartial justice, protects human rights, promotes investor confidence, upholds democracy, and combats corruption. It thus prayed that the Petition be allowed in the interests of justice and more so to maintain and protect the independence of the Judiciary as provided by law.

## **D. Submissions**

### **i. Petitioners' Submissions**

17. The Petitioners submitted that the Petition is not offensive to the doctrine of constitutional avoidance. They submitted that the Petition tables before the Court a dispute that has far reaching consequences, both constitutionally and practically, and thus it extends far beyond the scope of defamation. They argued that the remedies afforded to a litigant in a defamation suit does not allow declarations on violations of the constitution or threats to violations of the constitution.
18. The Petitioners also argued that the Petition did not offend the doctrine of exhaustion and relied on the cases of Geoffrey Muthiga Kabiru & 2 others Vs. Samuel Munga Henry & 1756 others [2015] eKLR; Anthony Miano & Others V. Attorney General & others [2021] Eklr which assert that there are exceptions to the doctrine of exhaustion which are if the Court deems that the exhaustion requirement would not serve the values enshrined in the constitution or law a petition is ripe for hearing and determination before this Court.
19. They added that at the heart of the Petition is whether the 1<sup>st</sup> Respondent through his utterances and conduct acted contrary to Chapter 6 of the constitution as well as Article 10 of the constitution; and the High Court sitting as a 'constitutional court' has the original unlimited jurisdiction mandated for the protection of the constitution under Article 165 and Article 258, and it is the only Court capable of granting appropriate remedies with regard to the complained utterances.
20. The Petitioners argue that the utterances and conduct of the 1<sup>st</sup> Respondent violate Article 73 and 75 of the constitution and urged the Court to take a holistic approach into interpreting the import of Articles 73 and 75 of the constitution and relied on the cases of Re Interim Independent Election Commission, Constitutional application 2 of 2011 (2011) eKLR and Felix Kiprono Matagei V Attorney General & 3 others [2016] eKLR.



## ii. The Respondents' Submissions

21. The 1<sup>st</sup> Respondent submitted that the Petition is devoid of merit and ought to be dismissed with costs for failing to disclose with specificity any cause of action against the 1<sup>st</sup> Respondent in accordance with the standard and threshold set in the case of *Anarita Karimi Njeru vs The Republic* [1976 – 1980] KLR 1271.
22. He further argues that the Petitioner has failed to enumerate with sufficient particularity, how his utterances of 14<sup>th</sup> January 2024 violated any constitutional provision. The 1<sup>st</sup> Respondent placed reliance on the case of *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* [2021] eKLR to buttress his argument that merely citing constitutional provisions without demonstrating how the said provisions have been violated or threatened with violation is not enough to warrant the granting of the orders sought.
23. The 1<sup>st</sup> Respondent further argued that the Petitioners' grievances about the specific utterances in issue are entirely anchored on the Petitioners' opinion and perception as to the 'propriety and appropriateness' of the said utterances. such grievances relating to the propriety or appropriateness of the impugned utterances are matters squarely within the ambit of defamation law, and hence they fall under the jurisdiction of the High Court Civil Division. To his mind, the utterances being in the form of alleged defamation, redress is personal to the Hon. Judge who was the subject of his comments and therefore the Petitioners lack the requisite locus standi to seek redress on behalf of the Hon. Judge, if at all the Hon. Judge was aggrieved by the utterances made concerning her.
24. The 1<sup>st</sup> Respondent concluded by submitting that the Petition violates the doctrine of Constitutional avoidance to the extent that there exist other bodies with the capability to better address the grievances of the Petitioners which were improperly styled as constitutional violations. Such bodies include the National Cohesion and Integration Commission and the 2<sup>nd</sup> Respondent.
25. The 2<sup>nd</sup> Respondent submitted that the 1<sup>st</sup> Respondent's utterances violated the fundamental provisions of the national values and principle of governance espoused under Articles 10, 75 and 232 of the *constitution* and Chapter 6 of the *constitution*.
26. It placed reliance on the cases of *Mike Sonko Vs. The County Assembly of Nairobi City & 11 others* Petition 11 (E008 of 2022) [2022] KESC 76; *Fredrick Otieno Outa Vs. Jared Odoyo Okello* Supreme Court of Kenya, Petition No. 6 of 2014 [2014] eKLR; *Trusted Society of Human Rights Alliance Vs. The Attorney General and Others*, Nairobi High Court Petition No. 229 of 2012 and *Benson Riitho Mureithi V. J.W. Wakhungu & 2 others* [2014] eKLR to espouse the fact that the 1<sup>st</sup> Respondent was at the time of making those utterances a State Officer within the meaning of Article 260 of the *constitution* and that the public utterances he made against Lady Justice E. Maina were in gross violation of Articles 10, 73 and 75 of the *constitution* and did not bring honour to the nation and dignity to the office the 1<sup>st</sup> Respondent held at the material time.

## The Interested Parties' Submissions

27. The 1<sup>st</sup> Interested party, in its submissions in support of the Petition, elected to restrict its submissions to the single issue of Independence of the judiciary.
28. The 1<sup>st</sup> Interested Party submitted that that the words and actions of the 1<sup>st</sup> Respondent infringed on the independence of the Judiciary. To its mind, a High Court Judge should possess the inviolable freedom of making decisions impartially, by his/her conscious and interpretation of the law, devoid of any form of pressure; principles which the 1<sup>st</sup> Respondent sought to undermine. To buttress this,



it placed reliance on the case of In the Matter of Interim Independent Electoral Commissions [2011] 2 KLR.

29. The 3<sup>rd</sup> Interested Party submitted that the Petitioners' claims concerning the conduct of the 1<sup>st</sup> Respondent while holding the Office of the Deputy President of the Republic of Kenya have now been overtaken by events following the impeachment of the 1<sup>st</sup> Respondent from the said office.
30. Regarding the Petitioners' claims against the 1<sup>st</sup> Respondent, the 3<sup>rd</sup> Interested Party submitted that the claims are prematurely before this Court and relied on the cases of Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR and Speaker of National Assembly v Karume [1992] KLR 21 to argue that they should be heard and determined in other forums before they can be brought to the High Court.
31. The 3<sup>rd</sup> Interested Party added that there exists a complaint before the Judicial Service Commission involving the 1<sup>st</sup> Respondent and the Hon. Lady Justice Esther Maina, and which complaint is pending hearing and determination before the aforesaid Commission. Consequently, the 3<sup>rd</sup> Interested Party submitted that the Petitioners have jumped the gun and prematurely invoked this Court's jurisdiction.

### **E. Analysis and Determination**

32. I have extensively considered all the pleadings filed, to wit; the petition and its supporting affidavit, the Responses filed by the respective parties in opposition thereto and finally the submissions filed by all the parties. The issues which arise for determination are;
  - a. Whether the Petition violates the doctrine of constitutional avoidance and the doctrine of exhaustion; and
  - b. Whether the Petition is merited and the reliefs sought ought to be granted.
    - i. Whether the Petition violates the doctrine of Constitutional avoidance and the exhaustion doctrine.
33. The doctrine of constitutional avoidance was expounded by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR. The Apex Court held as follows:-

“(256)The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

....(258)From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”



34. In *Southlake Panorama Limited V Kenya Electricity Transmission Company Limited & 3 others* [2021] eKLR, the Court stated;

“29. The constitutional jurisdiction of the court is a very specific jurisdiction which is not open to general claims. It is invoked pursuant to Articles 22 (1) and 23 of the *constitution* by filing a petition. The reliefs that a court exercising the constitutional jurisdiction can grant are clearly spelt out by Article 23 (3). The “compensation” contemplated by Article 23 is in regard to denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights under Article 22 and not compensation in respect of wayleave.

30. So as to ensure that constitutional jurisdiction of the court is not misused, the doctrine of constitutional avoidance comes in handy. It frowns upon the practice of bringing ordinary disputes to the constitutional court. In that regard, the Supreme Court observed as follows in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR...”

35. I am also persuaded by the dicta of the Hon. Justice J. M Mutungi in *Grays Jepkemoi Kiplagat V. Zakayo Chepkoga Cheruiyot* [2021] eKLR in which it was observed that: -

“parties are increasingly filing matters that are essentially civil matters and christening the same as constitutional petitions which is not proper...where there is an alternative remedy of filing a suit in the ordinary civil courts, a party ought not to invoke the jurisdiction of the *constitution* court.”

36. The instant Petition is one in which the Petitioners have ‘constitutionalized’ a dispute that would be better traversed either in a civil suit or through complaint proceedings under Section 11 of the *Ethics and Anti-Corruption Commission Act*.

37. Section 11 of The *Ethics and Anti-Corruption Commission Act*, No.22 of 2011 provides for the additional functions of the Commission and states that:

Additional functions of the Commission

(1) In addition to the functions of the Commission under Article 252 and Chapter Six of the *constitution*, the Commission shall—

.....

(b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anticorruption;

(c) receive complaints on the breach of the code of ethics by public officers;

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the *Anti-Corruption and Economic Crimes Act* or any other law enacted pursuant to Chapter Six of the *constitution*;

(e) recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;

(f) oversee the enforcement of codes of ethics prescribed for public officers;



38. In Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal stated that: -

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the constitution which commands Courts to encourage alternative means of dispute resolution. ”

39. Accordingly, I am satisfied that the nature of the complaints raised by the Petitioners ought to have been laid before the 2<sup>nd</sup> Respondent at the first instance and not brought to the High Court.

40. I also note that the subject matter of this Petition was brought before the Judicial Service Commission; and in this case it is in the interest of the proper administration of justice for that avenue to run its course before the High Court is called upon to adjudicate, if at all.

41. The twin issues of constitutional avoidance and the doctrine of exhaustion necessarily require a case-by-case application where the unique circumstances of each case are considered by the Court so as to ascertain whether the High Court should intervene. In the present Petition, the Petitioners have failed to demonstrate why those other avenues should not be allowed to run their course and why the High Court should intervene.

42. Having found that the Petition herein offends the doctrines of constitutional avoidance and exhaustion, it therefore automatically follows that the Petition is without merit and the reliefs sought cannot be granted by this Court.

**Disposition**

43. The upshot, considering the totality of all the facts and circumstances herein, I do find that the Petition herein lacks merit and the same is hereby dismissed.

44. This being a public interest litigation I direct that each Party shall bear its own costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 10<sup>TH</sup> DAY OF APRIL, 2025.**

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**BAHATI MWAMUYE**

**JUDGE**

